IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LAURIE J. POSS, M.D.	*	
Plaintiff	*	
vs.	*	CIVIL ACTION NO. MJG-01-3279
UNUM LIFE INSURANCE COMPANY OF NORTH AMERICA	*	
Defendant	*	

* * * * * * * * *

MEMORANDUM AND ORDER

The Court has before it Plaintiff's Motion for Summary Judgment on Count Two of the Amended Complaint, Defendant's Motion To Dismiss Count One of Plaintiff's Amended Complaint and Motion for Summary Judgment on Count Two of Plaintiff's Amended Complaint, and the materials submitted by the parties in relation thereto. The Court has held a hearing and has had the benefit of the argument of Counsel.

I. BACKGROUND[1]

This case arises out of a dispute over disability insurance payments owed to the Plaintiff, Dr. Laurie J. Poss ("Plaintiff"

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[1] Because both parties seek summary judgment, the facts are here presented in as neutral a fashion as possible. Any material disagreement between the parties as to the facts will be detailed, as necessary, in the Discussion section of this Memorandum.

or "Poss") pursuant to an insurance policy issued by the Defendant, UNUM Life Insurance Company of America ("Defendant" or "UNUM").

From 1994 until about September 1, 1999, Plaintiff operated a medical practice as Laurie J. Poss, M.D., P.A. ("the covered Corporation"), an S-Corporation of which she was both a shareholder and an employee. In September of 1994, UNUM issued a long-term disability policy to the Corporation ("the Policy"). The Policy covered employees in "active employment," which was defined in the policy as working on a full-time basis for the employer, at the employer's regular place of business or a place to which the employer's business required travel.

In September of 1998, Plaintiff entered an acquisition arrangement with Riverside Primary Care Associates, LLP (Riverside). Pursuant to this agreement, Riverside operated the Plaintiff's medical practice and paid Plaintiff and the covered Corporation certain sums as provided in the agreement. Plaintiff continued to operate her practice in the same manner, from the same locations, and with the same staff as when she had practiced as Laurie J. Poss, M.D., P.A. Premiums were paid on the Policy. See Affidavit of Helen White, at ¶9-10. In June of 1999, Plaintiff severed the relationship with Riverside. For the year

1999, Riverside issued a 1099 to Plaintiff individually in the amount of $100,000.

The parties agree that Plaintiff was rendered medically disabled under the Policy definition on or about September 12, 2000, due to injuries suffered in an accident. The only disputed issue is the amount of the disability benefits to which the Plaintiff is entitled.

At the time Plaintiff became disabled, UNUM began paying her benefits at a monthly minimum level while investigating Plaintiff's claim. The Policy entitled an employee rendered disabled to a maximum benefit of "60%... of basic monthly earnings not to exceed the maximum monthly benefit [$6,000], less other income benefits." The minimum monthly benefit consisted of the greater of $100 a month or 10% of the monthly benefit before deductions for other income benefits.

Plaintiff timely submitted a claim for benefits under the Policy. On February 7, 2001, UNUM denied the claim on the basis that Plaintiff was ineligible because her disability did not exceed the Policy's 90-day elimination period. Plaintiff challenged this interpretation of the Policy language and UNUM agreed that her disability would be covered under the Policy.

On March 12, 2001, UNUM notified Plaintiff that she would be entitled to payments of $100.00 a month, the minimum payment

under the Policy, on the basis of its analysis that her "basic monthly earnings" from the covered Corporation were zero.

Plaintiff filed the instant suit under state contract law (Count I) and, in the alternative, ERISA (Count II), seeking recovery of the benefits to which she claims she is entitled, in the amount of approximately $6,000 per month.

By her instant Motion, Plaintiff seeks summary judgment on her claim for disability benefits under ERISA (Count II). UNUM opposes this motion and moves for Dismissal of Count I and summary judgment on Count II.

II. LEGAL STANDARDS

A. Dismissal

A motion to dismiss for failure to state a claim under Rule 12(b)(6) is a means of testing the legal sufficiency of a complaint. The Court must deny a motion to dismiss unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The question therefore is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5A Charles Alan

Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 at 332-36 (2d ed. 1990).

The Court, when deciding a motion to dismiss, must consider well-pled allegations in a complaint as true and must construe those allegations in favor of the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969). The Court must further disregard the contrary allegations of the opposing party. See A.S. Abell Co. v. Chell, 412 F.2d 712, 715 (4th Cir. 1969). "However, the Court is not required to accept as true the legal conclusions set forth in a plaintiff's complaint." Nat'l Coalition for Students with Disabilities Educ. and Legal Def. Fund v. Scales, 150 F.Supp.2d 845, 849 (D. Md. 2001) (citing Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir. 1999)). A complaint may be dismissed if the law does not support the conclusions argued, or where the facts alleged are not sufficient to support the claim presented.

B. Summary Judgment

In deciding a summary judgment motion, the Court must look beyond the pleadings and determine whether there is a genuine need for trial. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court must determine whether the evidence presents a sufficient disagreement to

require submission to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-53 (1986). If the defendant carries its burden by showing an absence of evidence to support a claim, the plaintiff must demonstrate that there is a genuine issue of material fact for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). The Court must look at the evidence presented in regard to the motion for summary judgment through the non-movant's rose colored glasses but must view it realistically. Nevertheless, the non-movant is entitled to have all reasonable inferences drawn in his favor. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).

An issue of fact must be both genuine and material in order to forestall summary judgment. An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the plaintiff. See Anderson, 477 U.S. at 248. An issue of fact is material only if the establishment of that fact might affect the outcome of the lawsuit under governing substantive law. See id. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (internal citations omitted).

III. DISCUSSION

A. Standard of Review

The parties agree that the standard of review for this Court in reviewing a benefits determination under this Policy is de novo. Thus, the Court's task is to interpret the Policy according to ordinary principles of contract law. See Booth v. Wal-Mart Stores, Inc., 201 F.3d 335, 341 (4th Cir. 2000); Wheeler v. Dynamic Eng'g Inc., 62 F.3d 634, 638 (4th Cir. 1995).

A further question on de novo review is whether the Court may consider evidence outside the administrative record that was before the administrator who made the initial benefits decision. Plaintiff has submitted evidence outside of the administrative record in conjunction with her Motion, and UNUM argues that this evidence should not be considered.

In Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017 (4th Cir. 1993), the Fourth Circuit adopted a flexible approach as to what evidence a Court can consider under a de novo standard of review.

> In our view, the most desirable approach to the proper scope of de novo review under ERISA is one which balances the[] multiple purposes of ERISA. Consequently, we adopt a scope of review that permits the district court in its discretion to allow evidence that was not before the plan administrator. The district court should exercise its discretion, however, only when circumstances clearly establish that additional evidence is

> necessary to conduct an adequate de novo review of the benefit decision. In most cases, where additional evidence is not necessary for adequate review of the benefits decision, the district court should only look at the evidence that was before the plan administrator or trustee at the time of the determination.

Id. at 1025.

Thus, the Court shall exclude evidence outside of the administrative record, unless there is a clear showing that "additional evidence is necessary to conduct an adequate de novo review of the benefit decision." Id. Whether such "additional evidence" is necessary will be decided based upon each piece of evidence sought to be introduced, and at the time it is sought to be introduced.

B. Count I - State Law Contract Claim

UNUM moves to dismiss Plaintiff's contract claim, brought pursuant to Maryland law, on the basis that the Plaintiff's claim is governed by ERISA, and that Plaintiff's state-law cause of action is thus preempted. Plaintiff counters that because Defendant has attempted to characterize her as a "sole proprietor" under the Policy, ERISA does not apply. However, this argument is meritless. Nowhere has UNUM attempted to characterize Plaintiff as a "sole proprietor." Rather, UNUM has maintained throughout that the provisions of Section 3(a) and

(b), applying not to sole proprietors but to "other employees" apply to Plaintiff's claim for benefits.

Further, Plaintiff has herself moved for summary judgment on her ERISA claim, arguing that she is entitled to recover under ERISA.

1. Applicability of ERISA

ERISA, or The Employee Retirement Income Security Act of 1974 governs employee welfare benefit plans that an employer establishes or maintains for the benefit of its employees. 29 U.S.C. § 1002(3), 1003. ERISA defines an "employee welfare benefit plan," in pertinent part, as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . disability . . .

Id. § 1002(1).

An ERISA plan is established if there is "some payment and manifestation of intent by the employer . . . to provide a benefit to the employees or the employees' beneficiaries of the type described in 29 U.S.C. § 1002(1)." Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 417 (4th Cir. 1993).

The parties here appear to agree that the Policy is one maintained under ERISA. The Court so concludes. It is clear that the plan is "(1) a plan, fund or program, (2) established or maintained (3) by an employer, employee organization, or both, (4) for the purpose of providing a benefit, (5) to employees or their beneficiaries." Id. Neither party has presented any argument nor is there any evidence that the Policy falls within any exception or "safe harbor" provision that would make ERISA inapplicable.

2. Preemption of State Law Contract Claims

UNUM argues that because ERISA applies to Plaintiff's cause of action, her state law claims are preempted by ERISA's comprehensive scheme.

UNUM correctly points out that ERISA contains a broad preemption clause, stating that ERISA provisions "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan..." 29 U.S.C. §1144(a). "State law" is defined as "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." Id. at (c)(1). The Supreme Court has stated that ERISA's preemption clause is to be construed broadly to include claims having "a connection with or reference to" an ERISA plan.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). The Fourth Circuit, in keeping with the Supreme Court's mandate, has held that a state law contract claim for breach of an ERISA-covered policy is preempted by ERISA. Elmore v. Cone Mills Corp., 23 F.3d 855, 863 (4th Cir. 1994).

Plaintiff presents no argument as to why the Court should not follow established precedent. Thus, Plaintiff's state-law contract claim is preempted and shall be dismissed.

B. Calculation of Benefits Under the Policy

The calculation of "basic monthly earnings" is the only issue here in dispute. UNUM admits that Plaintiff is eligible for benefits under the Policy.[2]

"Basic monthly earnings" is defined in the policy as follows:

> If you are:
>
> 2. a Sole Proprietor, [basic monthly earnings] means your annual net profit averaged over:

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[2] Because UNUM has not denied the claim but instead has determined that Plaintiff is indeed entitled to payment of benefits under the Policy, Plaintiff's argument that UNUM, in initially denying benefits based on the limitations period, waived its right to deny benefits is inapposite. UNUM is not attempting to deny liability on new grounds. On the contrary, UNUM has accepted its liability for benefit payments. Plaintiff simply challenges UNUM's calculation of those benefits.

a. the 3 most recent years; or

b. the period you have been a sole proprietor, if you have been a sole proprietor for less than 3 years,

Then divided by 12.

* * *

3. an Employee other than Partners or Sole Proprietors, [basic monthly earnings] means your average monthly earnings as figured:

a. from the W-2 form (from the box which reflects wages, tips, and other compensation) received from the employer for the calendar year just prior to the date disability begins; or

b. for the period of employment, if no W-2 was received.

Further, "employer" is defined as "a proprietorship, partnership or corporation which becomes a participating employer by completing an application for participation and having the application approved...." In the instant case, the pertinent employer is Laurie J. Poss, M.D., P.A., the covered Corporation.

The date of disability was September 12, 2000. Accordingly, to determine basic monthly earnings pursuant to paragraph 3.a. of the policy, it was necessary to refer to the 1999 Form W-2 issued by the covered Corporation to Poss. However, in 1999 Poss engaged in an unsuccessful effort to merge the practice of the covered Corporation with another practice. Consequently, Poss worked for the covered Corporation for only six months in 1999

and the covered Corporation did not issue a Form W-2 to Poss. Accordingly, Poss' basic monthly earnings must be computed under paragraph 3.b of the Policy.

Pursuant to paragraph 3.b., Poss' "Basic Monthly Earnings" means her "average monthly earnings for the period of employment." The parties agree that the pertinent period of employment was the period from September 1, 1994 (when the Policy became effective) to the September 12, 2000 date of disability during which Poss was employed by the covered Corporation.

The record presented to the Court is not presently sufficient to permit a determination of the average monthly earnings. Accordingly, it is readily apparent that there are - as matters now stand - genuine issues of material fact which prevent a grant of summary judgment to either side with regard to the amount of the benefits to be paid Poss. Nevertheless, it appears that once Plaintiff produces her personal and corporate tax returns for the years 1994 or 1991 through 2000 together with necessary additional documents, a computation can be made without the necessity for a trial.

Of course, there appear to be various issues that will need to be resolved incident to the computation. These would include, but not be limited to, such matters as:

1. How to treat the six months in 1999 when Plaintiff worked for another corporation.

2. How to determine Plaintiff's "earnings" for disability income purposes in the context of a sub-S corporation.

Under the circumstances, the Court directs Plaintiff to provide Defendant and the Court with such additional tax returns, forms W-2, and other records as will be necessary to compute her "average monthly earnings" under the Policy. The parties should then seek to reach agreement as to the amount of benefits to which Plaintiff is entitled, recognizing that there appear to be significant debatable issues relating to the precise method of computation. Should the parties not reach agreement, the Court will review the documents and advise the parties as to any necessary further proceedings.

C. Attorney's Fees

Plaintiff has requested that the Court grant her attorney's fees pursuant to ERISA. 29 U.S.C. §1132(g)(1). The parties agree that the Court has discretion in awarding such fees. Further, the parties agree such fee determinations are to be guided, according to the Fourth Circuit, by a five-part inquiry, including:

1. The degree of culpability or bad faith on the part of the opposing party;

2. The ability of the opposing party to satisfy an award of attorneys' fees;

3. Whether an award of attorney's fees against the opposing party would serve a deterrent purpose;

4. Whether the party seeking attorneys' fees sought to benefit all participants in an ERISA plan or aid the resolution of a significant legal issue regarding ERISA; and

5. The relative merits of the parties' positions.

See Quisenbury, 987 F.2d at 1029. Further, the Fourth Circuit has stated unequivocally that only prevailing parties may be awarded attorney's fees under ERISA, and there is no presumption that prevailing parties are entitled to such an award. Martin v. Blue Cross & Blue Shield of Virginia, Inc., 115 F.3d 1201, 1210 (4th Cir. 1997)("we now make clear that in the Fourth Circuit, only a prevailing party is entitled to consideration for attorney's fees in an ERISA action").

Plaintiff can, even now, be viewed as the prevailing party because there seems to be no doubt that she is entitled to a benefit greater than the minimum being paid by Defendant. Nevertheless, Plaintiff has not proven bad faith on the part of UNUM in failing to pay heretofore whatever may turn out to be the correct amount. In fact, the Court - with access to more pertinent information than had been submitted to UNUM - cannot now determine the amount of Plaintiff's benefit and must require

more information from Plaintiff. The Court thus does not find an award of attorneys' fees appropriate.

IV. CONCLUSION

For the foregoing reasons:

1. Defendant's Motion to Dismiss Count One of Plaintiff's Amended Complaint is GRANTED.

2. Defendant's Motion for Summary Judgment on Count Two of Plaintiff's Amended Complaint is DENIED.

3. Plaintiff's Motion for Summary Judgment on Count Two of the Amended Complaint is GRANTED IN PART and DENIED IN PART.

    a. Plaintiff is entitled to have her benefits under the Policy computed pursuant to paragraph 3.b of the Policy.

    b. Plaintiff's request for attorneys' fees is DENIED.

4. By February 21, 2003 Plaintiff shall provide Defendant and the Court with such additional tax returns, W-2 forms, and other documents as may be necessary to compute Plaintiff's "basic monthly earnings."

5. Within 30 days of receipt of such documents, Defendant shall advise Plaintiff of its computation and its position as to the amount of Plaintiff's "basic monthly earnings."

6. The parties shall thereafter seek to resolve the computation by agreement.

    a. If successful, the parties shall so advise the Court and provide an agreed form of Judgment to close the case.

b. If unsuccessful, the parties shall so advise the Court and further proceedings, as may be necessary, shall be set by further Order.

7. If the Court has not been advised prior thereto, the parties shall report on the status of this matter by April 1, 2003.

SO ORDERED this 3rd day of February, 2003.

Marvin J. Garbis
United States District Judge